84-122

No.

Supreme Court of the United States

October Term, 1984

STATE OF OHIO,
Petitioner,

vs.

HARRY L. CHATTON,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of Ohio

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QUESTION PRESENTED

1. Whether the Fourth Amendment exclusionary rule should not be applied so as to bar the use in the Prosecution's case-in-chief of evidence obtained without a warrant by officers whose actions were taken in good faith and were objectively reasonable.

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PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of Ohio

The Prosecuting Attorney of Cuyahoga County, Petitioner herein, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Ohio Supreme Court entered in this proceeding on May 29, 1984.

OPINIONS BELOW

The opinion of the Court of Appeals, Eighth District, is unreported, but is printed in the Appendix, *infra,* p. A15.

The opinion of the Ohio Supreme Court is reported at 11 Ohio St. 3d 59 and printed in the Appendix, *infra,* p. A1.

JURISDICTION

The judgment of the Court of Appeals, Eighth District, was entered on March 3, 1983. The decision of the Ohio Supreme Court was entered on May 29, 1984, and this petition for certiorari was filed within 60 days of that date.

This Court's jurisdiction is invoked under 28 U.S.C., Section 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment of the United States Constitution provides, in pertinent part:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

On February 19, 1981, at approximately 5:45 p.m. Harry L. Chatton, Respondent herein, was driving an automobile on Broadway Avenue in Maple Heights, Ohio. Respondent was on his way to pick up his wife at work. With Respondent in the vehicle was his nine year old daughter.

Respondent's vehicle was observed by a Maple Heights police officer, D. M. Grossmeyer, who was travelling in the opposite direction in a patrol car. Grossmeyer saw

that Respondent's vehicle displayed no front license plate. As Respondent's vehicle passed by, Grossmeyer noticed that the vehicle displayed no rear license plate either. Grossmeyer turned around and proceeded to direct Respondent to the side of the road. Grossmeyer positioned the patrol car behind Respondent's stopped vehicle and approached the vehicle on foot.

As he reached Respondent's vehicle, Grossmeyer observed a temporary license placard of the cardboard variety lying on the rear deck of the vehicle directly beneath the rear window. Grossmeyer continued to the driver's side of Respondent's vehicle. There, Respondent was requested to produce his driver's license. Respondent produced his license and Grossmeyer returned to the patrol car to conduct a computer check of the validity of the license. Grossmeyer was informed by the dispatcher at the Maple Heights Police Department that the Bureau of Motor Vehicles listed Respondent's license as being suspended. Grossmeyer returned to Respondent who insisted that the information was erroneous and requested that Grossmeyer again check the information. Grossmeyer complied with Respondent's request but the same information, that Respondent's license was suspended, was once again received.

Grossmeyer testified that it was his belief that the law required temporary tags to be visibly displayed and that since Respondent's temporary tag was not so displayed, Grossmeyer had a duty to investigate the identity of the operator of the vehicle to determine if he was the owner or had the owner's permission to operate the vehicle. Grossmeyer, an eleven-year veteran of the Maple Heights Police Department at the time of the suppression hearing, also testified that in his experience temporary tags were

occasionally used to conceal the identity of stolen vehicles and were otherwise used illicitly.

Grossmeyer returned to Respondent's vehicle and placed him under arrest for driving while under a suspension. Respondent was ordered to step out of his vehicle, was patted down, and was handcuffed. Grossmeyer then undertook a search of the passenger compartment of the vehicle. During the course of this search, Grossmeyer discovered a loaded Charter Arms .44 Special revolver underneath the driver's seat.

Respondent was indicted for carrying a concealed weapon in violation of R.C. 2923.12. Respondent moved to suppress evidence of the gun on the basis that the search of Respondent's vehicle was unlawful. The trial court overruled Respondent's motion to suppress. Appellee then entered a plea of no contest to the charge in the indictment and a judgment of conviction was entered thereon. Respondent was sentenced to a prison term of one to ten years. The trial court suspended the prison term and ordered Respondent to spend one weekend in jail and serve two years of probation.

The court of appeals reversed Respondent's conviction and held that the trial court erred in not suppressing the evidence of the gun. The court of appeals and the Ohio Supreme Court reasoned that any reasonable suspicion that Respondent was violating the law was extinguished upon the officer's observance of the temporary tag and that the detention of Respondent beyond that moment was unlawful.

REASONS FOR GRANTING THE WRIT

The purpose of the exclusionary rule is to deter unlawful police conduct. Evidence obtained from a search should be suppressed only if it can be said the law enforcement officer had knowledge that the search was unconstitutional under the Fourth Amendment.

Thus, where the law enforcement officer's conduct is objectively reasonable, then:

> "excluding the evidence will not further the ends of the exclusionary rule in any appreciable way; for it is painfully apparent that . . . the officer is acting as a reasonable officer would and should act under the circumstances . . ." *Stone v. Powell,* 428 U.S., at 539-540 (White, J. dissenting).

1. Therefore, the inquiry must focus upon whether the police officer, in this case, had an objectively reasonable belief that Respondent was violating the law at the time he was detained. The evidence demonstrates that the police officer believed that Ohio law required temporary tags to be visibly displayed, and because Respondent's temporary license tag was not so displayed, the officer reasonably believed that he had a duty to investigate the identity of the operator of the vehicle to determine if he was the owner or had the owner's permission to operate the vehicle.

Thus, the officer's testimony demonstrated that he had a good faith objectively reasonable belief that his actions in detaining Respondent and searching the vehicle comported with existing law.

2. In view of the officer's objectively reasonable belief that it was proper to detain Respondent, the search

of Respondent's automobile and the subsequent seizure of the weapon was permissible under this Court's decisions in *Michigan v. Long,* 77 L. Ed. 2d 1201 (1983); and *New York v. Belton,* 453 U.S. 454 (1981).

3. As this Court recently noted in *U. S. v. Leon,* 52 U.S.L.W. 5155, 5159 (July 5, 1984), "[T]he costs and benefits of suppressing reliable physical evidence seized by officers reasonably relying on a warrant issued by a detached and neutral magistrate leads to the conclusion that such evidence should be admissible in the prosecution's case-in-chief."

The holding of *Leon* should be extended to those situations where a police officer makes an objectively reasonable good faith warrantless seizure of incriminating evidence.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

OPINION OF THE SUPREME COURT OF OHIO

(Decided May 29, 1984)

No. 83-645

THE SUPREME COURT OF THE STATE OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS

THE STATE OF OHIO,
Appellant,

vs.

HARRY L. CHATTON,
Appellee.

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11 Ohio St. 3d 59

Criminal law—Motor vehicles—Search and seizure—Authority of police to determine validity of driver's license once officer no longer has reason to suspect commission of traffic violation.

(No. 83-645—Decided May 29, 1984.)

APPEAL from the Court of Appeals for Cuyahoga County.

On February 19, 1981, at approximately 5:45 p.m. Harry L. Chatton, appellee herein, was driving an automobile on Broadway Avenue in Maple Heights, Ohio. Appellee was on his way to pick up his wife at work. With appellee in the vehicle was his nine year old daughter.

Appellee's vehicle was observed by a Maple Heights police officer, D. M. Grossmeyer, who was travelling in the opposite direction in a patrol car. Grossmeyer saw that appellee's vehicle displayed no front license plate. As appellee's vehicle passed by, Grossmeyer noticed that the vehicle displayed no rear license plate either. Grossmeyer turned around and proceeded to direct appellee to the side of the road. Grossmeyer positioned the patrol car behind appellee's stopped vehicle and approached the vehicle on foot.

As he reached appellee's vehicle, Grossmeyer observed a temporary license placard of the cardboard variety lying on the rear deck of the vehicle directly beneath the rear window. Grossmeyer continued to the driver's side of appellee's vehicle. There, appellee was requested to produce his driver's license. Appellee produced his license and Grossmeyer returned to the patrol car to conduct a computer check of the validity of the license. Grossmeyer was informed by the dispatcher at the Maple Heights Police Department that the Bureau of Motor Vehicles listed appellee's license as being suspended. Grossmeyer returned to appellee who insisted that the information was erroneous and requested that Grossmeyer again check the information. Grossmeyer complied with appellee's request but the same information, that appellee's license was suspended, was once again received.[1]

Grossmeyer returned to appellee's vehicle and placed appellee under arrest for driving while under a suspension. Appellee was ordered to step out of his vehicle, was patted down, and was handcuffed. Grossmeyer then undertook a search of the passenger compartment of the vehicle. During the course of this search, Grossmeyer discovered

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1. The record indicates that appellee's license was erroneously listed as suspended.

a loaded Charter Arms .44 Special revolver underneath the driver's seat.

Appellee was indicted for carrying a concealed weapon in violation of R.C. 2923.12.[2] Appellee moved to suppress evidence of the gun on the basis that the search of appellee's vehicle was unlawful. The trial court overruled appellee's motion to suppress. Appellee then entered a plea of no contest to the charge in the indictment and a judgment of conviction was entered thereon. Appellee was sentenced to a prison term of one to ten years. The trial court suspended the prison term and ordered appellee to spend one weekend in jail and serve two years of probation.

The court of appeals reversed appellee's conviction and held that the trial court erred in not suppressing the evidence of the gun. The court of appeals reasoned that any reasonable suspicion that appellee was violating the law was extinguished upon the officer's observance of the temporary tag and that the detention of appellee beyond that moment was unlawful.

The cause is now before this court upon the allowance of a motion for leave to appeal.

Per Curiam. The issue in the case *sub judice* is whether the police officer, having detained appellee for a suspected traffic violation, continued to possess the authority to detain appellee for the purpose of determining the validity of appellee's driver's license once the officer no longer had reason to suspect that appellee was committing any traffic violation. While the issue is easily

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2. R.C. 2923.12(A) states,

"No person shall knowingly carry or have, concealed on his person or concealed ready at hand, any deadly weapon or dangerous ordnance."

stated, its resolution presents a weighty problem involving implications which extend beyond the facts of the case at bar.

The parties concede at the outset that the police officer was justified in stopping appellee's vehicle since the vehicle displayed neither front nor rear license plates. R.C. 4503.21 requires that license plates with the appropriate validation sticker be displayed on the front and rear of all motor vehicles (with certain exceptions) and "shall be securely fastened so as not to swing." R.C. 4503.182(A) provides that the purchaser of a motor vehicle may be issued a "temporary license placard" which may be used "to legally operate the motor vehicle while proper title and license plate registration is being obtained." However, R.C. 4503.182 does not provide that these temporary license placards, commonly known as "temporary tags," must be displayed in any particular fashion. While it may be accepted practice to display temporary tags on the rear of the vehicle or in the rear windshield, there appears to be no mandatory requirement that they be visibly displayed at all. Indeed, the General Assembly may deem it advisable to provide for the display of temporary tags at some future date. Nevertheless, the statutory framework in place at the time of appellee's arrest, and in effect at this writing, does not call for the display of temporary tags. It follows that, as long as the operator of a motor vehicle without the standard front and rear metal license plates can produce a valid temporary tag, it cannot be said that the vehicle is being operated illegally or improperly.

The question necessarily becomes whether the police officer has continuing justification to detain appellee and demand production of his driver's license once the police officer viewed the temporary tags lying on the rear deck

of appellee's vehicle. We are compelled to respond in the negative.

It is firmly established that the detention of an individual by a law enforcement officer must, at the very least, be justified by "specific and articulable facts" indicating that the detention was reasonable. *Terry v. Ohio* (1968), 392 U.S. 1, 21-22 [44 O.O.2d 383]; *State v. Freeman* (1980), 64 Ohio St. 2d 291, 294 [18 O.O.3d 472]. In *Brown v. Texas* (1979), 443 U.S. 47, 51, Chief Justice Burger wrote for a unanimous court:

"* * * [T]he Fourth Amendment requires that a seizure must be based on specific, objective facts indicating that society's legitimate interests require the seizure of the particular individual, or that the seizure must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers."

In *Brown v. Texas, supra,* the United States Supreme Court held that merely because an individual "looked suspicious" provided no justification to detain him and demand that he identify himself.

Furthermore, in *Delaware v. Prouse* (1979), 440 U.S. 648, the United States Supreme Court condemned the use of random stops of vehicles to check the validity of the operator's driver's license and the vehicle's registration. The court held at 663:

"* * * [E]xcept in those situations in which there is at least articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law, stopping an automobile and detaining the driver in order to check his driver's license and the registration of the automobile are unreasonable under the Fourth Amendment."

The inquiry herein must focus upon whether Grossmeyer, the police officer in this case, harbored an "articulable and reasonable suspicion" that appellee was violating the law at the time appellee was detained and ordered to produce his driver's license.[3] Grossmeyer testified that it was his belief that the law required temporary tags to be visibly displayed and that since appellee's temporary tag was not so displayed, Grossmeyer had a duty to investigate the identity of the operator of the vehicle to determine if he was the owner or had the owner's permission to operate the vehicle. Grossmeyer, an eleven-year veteran of the Maple Heights Police Department at the time of the suppression hearing, also testified that in his experience temporary tags were occasionally used to conceal the identity of stolen vehicles and were otherwise used illicitly.

The police officer's testimony must be viewed in the context of his mistaken belief that it was a violation of the law not to display temporary tags. The reality of the situation is that the police officer, absent reference to the failure on appellee's part to display his temporary tag, articulated no specific facts upon which a reasonable suspicion could be based that appellee was violating the law. If we were to uphold the detention of appellee to check the validity of his driver's license upon the generalized statement that temporary tags are sometimes used in criminal activity, we would be sanctioning, in effect, the detention of the driver of any vehicle bearing temporary tags. We are unwilling to place our imprimatur on

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3. We are not confronted in the present appeal with an issue relating to whether the evidence seized was in plain view, *Texas v. Brown* (1983), 75 L. Ed. 2d 502; *State v. Williams* (1978), 55 Ohio St. 2d 82 [9 O.O.3d 81], or whether the evidence was seized pursuant to a lawful inventory of the vehicle, *South Dakota v. Opperman* (1976), 428 U.S. 364; *State v. Robinson* (1979), 58 Ohio St. 2d 478 [12 O.O.3d 394].

searches of the citizens of this state and their vehicles simply because of the lawful and innocuous presence of temporary tags. The potential for abuse if such a rule were in effect, through arrogant and unnecessary displays of authority, cannot be ignored or discounted.

"* * * [T]o eliminate any requirement that an officer be able to explain the reasons for his actions signals an abandonment of effective judicial supervision of this kind of seizure and leaves police discretion utterly without limits. Some citizens will be subjected to this minor indignity while others—perhaps those with more expensive cars, or different bumper stickers, or different-colored skin —may escape it entirely." *Pennsylvania v. Mimms* (1977), 434 U.S. 106, 122, Stevens, *J.*, dissenting.

The state relies heavily on *New York v. Belton* (1981), 453 U.S. 454, and *Michigan v. Long* (1983), 77 L. Ed. 2d 1201. In *Belton, supra,* the United States Supreme Court held that when an occupant of an automobile is subject to custodial arrest, the scope of the permissible search incident to the lawful arrest includes the passenger compartment of the vehicle as well as containers found therein. In *Long, supra,* the United States Supreme Court held that a *Terry* search could validly extend beyond the person of the individual detained to the passenger compartment of the vehicle. Neither of these cases addresses the question presented herein. Both *Belton* and *Long, supra,* simply relate to the scope of a search once the circumstances exist to conduct the search. The question presented in this appeal deals with whether, in the first instance, the circumstances justified appellee's detention to check the validity of his driver's license.

Perhaps the closest the United States Supreme Court has come to resolving the issue confronting this court today

was in *Pennsylvania v. Mimms, supra.* There, an individual was stopped when police officers observed that his vehicle had an expired license plate. The individual was ordered out of his car. The officers noticed a bulge in the individual's jacket and proceeded to frisk him. A loaded handgun was discovered on his person, the gun was admitted as evidence, and the individual was convicted of carrying a concealed weapon. The Supreme Court upheld the validity of the search, holding that under *Terry*, the police officer could reasonably order the individual out of the car and conduct a limited search for weapons. See, also, *State v. Darrington* (1978), 54 Ohio St. 2d 321 [8 O.O.3d 318]. Nevertheless, the facts of the instant case are readily distinguishable. In *Mimms, supra,* the police officers continued to possess at least a reasonable suspicion *throughout the search* that the individual was driving an unregistered vehicle. By contrast, once the police officer herein observed the temporary tags, appellee could no longer be reasonably suspected of operating an unlicensed or unregistered vehicle. That characteristic immediately removes this appeal from the realm of *Mimms* or *Darrington, supra.*

In our view, because the police officer no longer maintained a reasonable suspicion that appellee's vehicle was not properly licensed or registered, to further detain appellee and demand that he produce his driver's license is akin to the random detentions struck down by the Supreme Court in *Delaware v. Prouse, supra.* Although the police officer, as a matter of courtesy, could have explained to appellee the reason he was initially detained, the police officer could not unite the search to this detention, and appellee should have been free to continue on his way without having to produce his driver's license. Cf. *United States v. Place* (1983), 77 L. Ed. 2d 110 (prolonged detention unreasonable under *Terry*).

Consequently, where a police officer stops a motor vehicle which displays neither front nor rear license plates, but upon approaching the stopped vehicle observes a temporary tag which is visible through the rear windshield, the driver of the vehicle may not be detained further to determine the validity of his driver's license absent some specific and articulable facts that the detention was reasonable. As a result, any evidence seized upon a subsequent search of the passenger compartment of the vehicle is inadmissible under the Fourth Amendment to the United States Constitution.

Accordingly, the judgment of the court of appeals is affirmed.[4]

Judgment affirmed.

CELEBREZZE, *C.J.*, FORD, LOCHER, HOLMES, C. BROWN and J. P. CELEBREZZE, *JJ.*, concur.

DAHLING, *J.*, dissents.

FORD, *J.*, of the Eleventh Appellate District, sitting for W. BROWN, *J.*

DAHLING, *J.*, of the Eleventh Appellate District, sitting for SWEENEY, *J.*

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4. We acknowledge that in January of this year the United States Supreme Court heard arguments on whether to recognize a good faith exception to the Fourth Amendment exclusionary rule. *Massachusetts v. Sheppard* (1982), 387 Mass. 488, 441 N.E. 2d 725, certiorari granted (1983), 77 L. Ed. 2d 1386; *United States v. Leon* (C.A. 9, 1983), 701 F.2d 187, certiorari granted (1983), 77 L. Ed. 2d 1386. It would appear that a mistaken belief on the part of a police officer that an individual's conduct is a violation of the law would not fall within such a good faith exception if adopted by the Supreme Court. Nonetheless, even should a good faith exception to the exclusionary rule be recognized for Fourth Amendment purposes, the question remains whether we would likewise recognize such an exception under Section 14, Article I of the Ohio Constitution.

DAHLING, *J.*, dissenting. Officer D. M. Grossmeyer testified that the initial stop and detention of appellee's vehicle were predicated on the lack of observable *license plates*. After determining that appellee possessed a temporary tag, Grossmeyer inquired into the status of appellee's *driver's license*. A computer check of appellee's driver's license revealed that his driving privileges had been suspended. A computer recheck produced the same results.

At this point in the detention, probable cause existed for the arrest of appellee for no valid operator's license. As a consequence, the subsequent search of the passenger compartment of appellee's vehicle was within the guidelines of the Fourth Amendment. *New York v. Belton* (1981), 453 U.S. 454, states at page 460 that, "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile."

Grossmeyer testified:

"Q. And what was your reason for stopping this automobile?

"A. There was [*sic*] no plates on the front or rear, visible.

"Q. And as a result of seeing no plates on either the front or the rear, you pulled the car over?

"A. Yes, I did sir.

"Q. And what did you do at that point?

"A. I approached the car, and I observed a 30 day tag laying [*sic*] on the back of the back deck of the vehicle.

"Q. At what point were you able to see the 30 day tag he had?

"A. You had to walk right up on [*sic*] it. You couldn't see inside. Actually, you had to get out, walk up, and look in through the back window.

"Q. As a result of seeing a 30 day tag laying [*sic*] by the back window, what did you do?

"A. I requested registration information and identification from the driver. * * *

"* * *

"Q. And did he produce his driver's license?

"A. Yes, he did.

"Q. What if anything did you do with the driver's license?

"A. By that time I walked back to my police unit and requested information on the individual as far as driving record, the validity of his driver's license, and any record. * * *

"* * *

"A. It came back from the Bureau of Motor Vehicles that the individual in question had no driving privileges until I believe '82, September of '82. He was under suspension.

"Q. As a result of learning, or discovering this information, what did you do?

"A. I walked back up to the vehicle, requested that he step out of the car.

"I advised him he was being placed under arrest, because he didn't have a driver's license.

"I then told him to stand—he was searched against the side of the car, and at that point after I patted him down; he was up against the car, I looked inside the vehicle and by checking underneath the seat I found a loaded weapon.

"Q. What type of weapon?

"A. It was a .44 Special. I think it was a Charter Arms.

"Q. So it is your testimony that when you discovered that his license was under suspension that you decided to place him under arrest?

"A. Absolutely, sir.

"Q. And after you placed him under arrest, you patted him down?

"A. Right.

"Q. And after you patted him down you searched under, or where did you find the gun again?

"A. It was under the driver's seat. If you are sitting behind the seat, between your legs, on the floor, under the seat. It was in a leather holster. * * *"

Judge Burt Griffin, the trial judge below, fairly summarized the testimony as follows:

"So that the record may be clear, let me state the facts are that on February 19, 1981 that somewhere around 5:40 p.m. on Broadway Avenue in the City of Maple Heights, police officer Grossmeyer, of the Maple Heights Police Department saw a 1973 Oldsmobile proceeding in an opposite direction from him on Broadway, and he noticed that the front plate had no, that there were no front license plates [*sic*] visible.

"As the car passed him he turned to look at it, could not see any rear license plates [*sic*], so he did a U-turn, came up behind it, still could not see a rear license plate, and ordered the car stopped.

"When Officer Grossmeyer got out of his automobile and walked towards the car he got to the back of the car, he saw a thirty day tag lying horizontally on the back deck inside the back window of the automobile.

"This the officer believed was a violation of State requirements that a license plate, temporary license plate, like any license plate, must be visible.

"At that time, because in his experience, as he used it, temporary license plates can be misused, he decided to inquire further to ascertain whether this man was entitled to use the temporary license plate, and find out whether the driver was in fact the owner of the car, since it also was his experience that part of the misuse of temporary license plates is that they are used on cars that are either stolen, or used to commit crimes, so the police officer then asked the defendant for his driver's license.

"It is to be noted at this point there was in the automobile the defendant's nine year old daughter.

"The license plate was produced. The police officer checked it out by radio, back to his station, where then was made an entry in the computer system that the State of Ohio provided, and it came back that, told via radio, that the computer had reported that the man was driving without driving privileges, that his driver's license had been suspended.

"At the request of the defendant he then checked again to see if this was still accurate, and a second check also produced proof that that license had been suspended, and in fact the license had been suspended at that time, although it subsequently developed that

the State of Ohio conceded that they had improperly suspended his license.

"At that point, therefore, the officer concluded that he had to take the defendant into custody, and he patted him down for a search, and planned to transport him back to the police station.

"After the pat down search, the officer checked the automobile, searched the inside of the automobile, and where [*sic*] he found a gun under the driver's seat, in a holster, under the front seat, driver's side of the automobile. * * *"

Apparently, the majority of this court feel that once the officer observed the temporary tag he should have let appellee go on his way. In my view, it was totally proper for the officer to ask for appellee's driver's license and to run a computer check.

I would hold that the trial court properly denied the motion to suppress and (after appellee's no contest plea) found appellee guilty. The judgment of the court of appeals discharging appellee should be reversed.

OPINION OF THE COURT OF APPEALS OF CUYAHOGA COUNTY, OHIO

(Dated March 3, 1983)

No. 45170

COURT OF APPEALS OF OHIO
EIGHTH DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO,
Plaintiff-Appellee

vs.

HARRY L. CHATTON,
Defendant-Appellant

APPEAL FROM COMMON PLEAS COURT
No. CR-162866

JOURNAL ENTRY AND OPINION

BROGAN, J.:

This cause came on to be heard upon the pleading and the transcript of the evidence and record in the Common Pleas Court, and was argued by counsel; on consideration whereof, the court certifies that in its opinion substantial justice has not been done the party complaining, as shown by the record of the proceedings and judgment under review, and judgment of said Common Pleas Court is reversed. Each assignment of error was reviewed by the court and upon review the following disposition made:

Appellant was indicted for carrying a concealed weapon in violation of R.C. 2923.12. Appellant orally moved to suppress the evidence, to-wit a loaded Charter Arms .44 Special revolver. Appellant contended that the weapon was discovered by the police as a result of an unreasonable search and seizure in that the search and seizure were conducted without a warrant. The trial court overruled the motion to suppress and the appellant proceeded to enter a plea of no contest to the charge. The trial court indicating that it would take notice of the facts elicited at the suppression hearing found the appellant guilty as charged. After a pre-sentence investigation, the trial court sentenced the appellant to a term of one to ten years in the Ohio Penitentiary, and suspended execution of sentence and placed the appellant on probation. From the judgment and sentence appellant has filed a timely appeal asserting two assignments of error:

> "*Assignment of Error No. 1:* The trial court erred in overruling the defendant-appellant's motion to suppress, because the length and scope of the seizure was not strictly tied to and justified by, the circumstances which made its initiation permissible."
>
> "*Assignment of Error No. 2:* The trial court erred in holding that the defendant had the burden of proving that the prosecution evidence was illegally obtained."

The facts underlying the appeal are not essentially in dispute. On February 19, 1981, at approximately 5:45 p.m., appellant in the company of his nine year old daughter, was driving southbound on Broadway Avenue in Maple Heights, Ohio, to pick up his wife at her employment. Ronald Grossmeyer, a patrolman with the City of Maple Heights, was proceeding in his patrol car in

the opposite direction, when he observed that appellant was operating his automobile without license plates on either the front or rear of his vehicle. Officer Grossmeyer made a u-turn and proceeded to signal with his flashing lights for the appellant to pull his vehicle over.

Grossmeyer testified that as he approached from the rear of the appellant's automobile he observed a 30-day tag lying on the back deck of the vehicle. Grossmeyer testified he then approached appellant who was seated in his automobile and requested from him his driver's license. He stated he then proceeded back to his patrol car where he requested information from his dispatcher as to the validity of appellant's license and his driving record. Upon learning from the dispatcher that the Bureau of Motor Vehicles listed appellant's driver's license under suspension, he proceeded to appellant's vehicle and ordered the appellant to get out of the car. Grossmeyer stated he then informed appellant he was under arrest for driving while under suspension and he proceeded to conduct a pat-down search of the appellant. He stated he searched under the front seat of the appellant's car where he discovered the loaded firearm.

Appellant corroborated the testimony of Officer Grossmeyer. However, he stated the 30-day tag was semi-attached to the rear window of the vehicle with tape. He stated he asked the officer to double check his information that his license was suspended which the officer did. He stated he was ordered out of the vehicle, patted down, and handcuffed prior to the search of the vehicle. He stated he was later informed by the Bureau of Motor Vehicles that his license was not under suspension.

A police officer's stopping an automobile and detaining its occupants constitute a "seizure" within the meaning

of the Fourth and Fourteenth Amendments, even though the purpose of the stop is limited and the resulting detention quite brief. *United States v. Martinez-Fuerte* (1976), 428 U.S. 543. *Delaware v. Prouse* (1979), 440 U.S. 648, Mr. Justice White stated in pertinent part at page 670 of that opinion:

> "We cannot assume that the physical and psychological intrusion visited upon the occupants of a vehicle by a random stop to check documents is of any less moment than that occasioned by a stop by border agents on roving patrol. Both of these stops generally entail law enforcement officers signaling a moving automobile to pull over to the side of the roadway, by means of a possibly unsettling show of authority. Both interfere with freedom of movement, are inconvenient, and consume time. Both may create substantial anxiety."

The Supreme Court in *Delaware v. Prouse, id.*, held that a police officer's stopping an automobile and detaining the driver in order to check the driver's license and the registration of the automobile constitute an unreasonable seizure under the Fourth and Fourteenth Amendments, where the police officer has no articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law, these being no justification for subjecting every occupant of every vehicle on the roads to a seizure at the unbridled discretion of law enforcement officials on the basis of a state interest in promoting roadway safety.

When Officer Grossmeyer observed that appellant's vehicle did not have license plates on the front and rear,

and he could not see a temporary 30-day license tag visible, he acted reasonably in stopping appellant's automobile. However, when he approached appellant's vehicle and saw that appellant did have a 30-day tag lying on his back window, the purpose of the stop and detention of the appellant was completed. Perhaps it would not have been unreasonable for the officer to approach the appellant and inform him that the temporary tag should be placed in such a manner as to be visible from the outside of the automobile (however, we are unable to find any such requirement under the statutes of this state).[1]

Nonetheless, although satisfied that appellant was not in violation of driving a motor vehicle without proper license tags, the officer proceeded to obtain appellant's driver's license and detain him while he proceeded to return to his patrol car to radio his dispatcher for verification as to appellant's driving record, the validity of his driver's license, and any record (Tr. 15). There was absolutely nothing in the record to suggest that appellant was not obeying all traffic laws, was not the registered owner of the car, or not in possession of a valid driver's license.

The length and scope of any "detention must be strictly tied to and justified by the circumstances which rendered its initiation permissible." *Terry v. Ohio* (1968), 392 U.S. 1. The length and scope of a detention was addressed by the Ninth Circuit Court of Appeals in *United States v. Luckett* (1973), 484 F. 2d 89. In that case the accused was stopped from jaywalking at 12:30 a.m. The accused readily admitted his error and at the request of one of the officers produced five pieces

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1. R.C. 4503.182.

of identification. Although the identification produced did not include a driver's license, appellee explained that this was because he could not drive. The officer accepted the identification and executed a traffic citation. Throughout this time appellee had been cooperative and had done nothing to arouse particular suspicion. Nevertheless, rather than release appellee at this point, the officers continued to detain him in order to run a warrant check on the name he gave. This was done for the sole reason that he lacked a driver's license. The warrant check produced information that there was an outstanding traffic warrant against the accused, and following his arrest and search counterfeit money orders were found in his pocket.

In upholding the trial court's determination that the fruits of the arrest and search must be suppressed, the court cited with approval the *Terry* language that the detention must be "strictly tied to and justified by the circumstances which rendered its initiation permissible." This standard, the court held, permits a police officer to detain an individual stopped for jaywalking only the time necessary to obtain satisfactory identification from the violator and to execute a traffic citation. Here the police had completed both these functions, but they continued to detain appellee for a warrant check. Because they had no reasonable grounds to be suspicious that there might be a warrant outstanding against him, the court held the continued detention unreasonable, and its fruits suppressed.

In the matter *sub judice*, the police officer had no reasonable grounds to be suspicious of appellant other than driving without license tags. That suspicion was extinguished when the officer saw the 30-day tag. The detention which followed was unreasonable and the fruits

of the subsequent arrest and search must be suppressed. The burden is on the prosecution to justify the reasonableness of any arrest and seizure (detention) which takes place without the judicial intervention of the warrant process.

The assignments of error are well taken and the judgment and sentence of the trial court is reversed and defendant discharged.

This cause is reversed and defendant discharged.

It is, therefore, considered that said appellant recover of said appellee his costs herein.

It is ordered that a special mandate be sent to said Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

DAY, *P.J.*, and
CORRIGAN, *J.*, concur

/s/ JAMES A. BROGAN
Judge
(2nd App. Dist., sitting by assignment)

No 84-122 (2)

In the Supreme Court of the United States

October Term, 1984

STATE OF OHIO,
Petitioner,

vs.

HARRY L. CHATTON,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

1. Whether a mistaken belief by a law enforcement officer that an individual's conduct is a violation of the law constitutes a good faith exception to the Fourth Amendment exclusionary rule where evidence is obtained without a warrant.

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RESPONDENT'S BRIEF IN OPPOSITION

The respondent Harry L. Chatton, by and through his attorneys Alfred C. Grisanti and John M. Badalian, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Ohio Supreme Court's opinion in this case. That opinion is reported at 11 Ohio St. 3d 59.

SUMMARY OF ARGUMENT

1. The decisions of the Court rendered in *United States v. Leon*, 52 U.S.L.W. 5155 and *Massachusetts v. Sheppard*, 52 U.S.L.W. 5177 are clearly not applicable to the instant situation where a law enforcement official made

a warrantless seizure of a citizen due to his ignorance or disregard of state statutory law. The Court has voiced a strong preference for judicial scrutiny of warrantless searches and seizures in order to check the "unfettered discretion" sought by law enforcement. *United States v. Brignoni-Ponce*, 422 U.S. 873.

REASONS WHY THE WRIT SHOULD BE DENIED

1. Neither the previous decisions of the Court nor the record support the Petitioner's assertion that an objectively reasonable good faith warrantless seizure was made in this case.

The Petitioner's reliance on *United States v. Leon*, 52 U.S.L.W. 5155 (July 5, 1984) and *Massachusetts v. Sheppard*, 52 U.S.L.W. 5177 (July 5, 1984) is misplaced. *Leon* and *Sheppard* address the issue of whether the Fourth Amendment exclusionary rule should be applied so as bar the use in the prosecutor's case-in-chief of evidence obtained by law enforcement officials acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate, but later found to be invalid. In the instant case, the police officer initiated the seizure of the Respondent absent a warrant and without "the detached scrutiny of a neutral magistrate". *United States v. Chadwick*, 433 U.S. 1, 9. The Court found in both *Leon* and *Sheppard*, *supra*, that the Fourth Amendment cannot be expected and should not be applied to deter reasonable law enforcement activity, noting that, in both cases the law enforcement officers took every step that could be reasonably expected of them and that their conduct was objectively reasonable. The police officer in the present matter persisted in the seizure of the Respondent because of disregard or ignorance

of the statutory requirements of the law he had sworn to uphold. This was not a situation where the officer misconstrued a fact situation and erroneously applied it to existing law; but rather one where the officer correctly perceived the facts but proceeded in disregard or total ignorance of the law. The Petitioner is attempting to disguise this disregard or ignorance by labeling it as a "good faith objectively reasonable belief" when in fact, it is nothing more than "standardless and unconstrained discretion" on the part of the officer involved. *Delaware v. Prouse,* 440 U.S. 648, 661 (1979). The police officer's "belief" in this case is not the objectively reasonable belief of *Leon* or *Sheppard, supra,* but at best a subjective feeling by the officer. The Court stated in *Beck v. Ohio,* 379 U.S. 89, 97 that:

> If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate and the people would be secure in their persons, papers and effects only at the discretion of the police.

This Court has repeatedly emphasized that warrantless searches and seizures are subject to thorough review by the Court. *Delaware v. Prouse, supra, Almeida-Sanchez v. United States,* 413 U.S. 266. *Coolidge v. New Hampshire,* 403 U.S. 443, *Brown v. Texas,* 443 U.S. 47, *United States v. Brignoni-Ponce,* 422 U.S. 873 and that . . . "those charged with this investigation and prosecutorial duty should not be the sole judge of when to utilize constitutionally sensitive means in pursuing their tasks" *Almeida-Sanchez v. United States,* 413 U.S. 266, 280 (Powell, *J.* concurring).

The argument asserted by the Petitioner, if accepted, could only result in the kind of standardless and unconstrained discretion on the part of law enforcement officials

which the Court has checked in a consistent line of authority (cited, *supra*). This Court's efforts to establish a fair, common sense balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers, *Brown v. Texas,* 443 U.S. 47, 50 would be ill-served by the adoption of the Petitioner's flawed standard.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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